BEFORE THE
WORLD TRADE ORGANIZATION

UNITED STATES – MEASURES TREATING EXPORT RESTRAINTS AS SUBSIDIES

WT/DS194

EXECUTIVE SUMMARY OF ANSWERS OF THE UNITED STATES OF AMERICA TO QUESTIONS FROM THE PANEL

28 February 2001

1. The DOC has not taken a definitive position on the status of export restraints, other than to express the opinion that, in the appropriate circumstances, an export restraint might satisfy the definition of a subsidy set forth in the U.S. statute and the SCM Agreement. Thus, with respect to many of the questions posed by the Panel, there is no DOC or U.S. position, nor could there be in the absence of an actual case. Therefore, the answers set forth herein do not necessarily reflect what the DOC would do if confronted with actual facts in an actual case.

Questions to the United States (First Set)

2. **Q1:** This question highlights the problematic nature of this dispute. It is neither practicable nor desirable for the Panel to attempt to define, in the abstract, a term that does not appear in the SCM Agreement, but the ordinary meaning of "export restraint" would be an action or an act that holds back or prevents exports. Canada concedes that an export restraint can result in "a price effect beneficial to users of the restricted product", and Canada does not allege that an export restraint is incapable of providing a "benefit." As examples of export restraints, the US refers the Panel to WT/TPR/S/51, page 105; CDA-12 and CDA-13; CDA-14; CDA-22; US-30; and WT/TPR/S/81, pages 65-67. The US declines to speculate on whether any of these export restraints would constitute a subsidy under the new definition of "subsidy" in Article 1.1. The US notes that under its pre-WTO CVD law, the DOC found that the export restraints existing at the time in Alberta, Ontario and Quebec did not constitute subsidies.

3. **Q2:** The US agrees that "financial contribution" under Article 1.1(a) and "benefit" under Article 1.1(b) are separate and distinct requirements that must be satisfied for a finding of a "subsidy" under the SCM Agreement. In the case of an export restraint, the same body of evidence might be relevant for purposes of determining whether both requirements are satisfied, and the requirements may not be totally unrelated.

4. **Q6(a):** The US does not consider the two statements to be in conflict. If the meaning of a statutory provision were clear, a contrary meaning expressed in the SAA could not override the statute.

5. **Q6(b):** Under U.S. legal principles the goal of statutory interpretation is to accurately discern the intent of the legislature. In cases where a statute is ambiguous or where confirmation of a clear statutory meaning is sought, interpreters may resort to legislative history to help discern the legislature's intent. An interpreter could properly resort to the SAA to identify the intent of the U.S. Congress. As an "authoritative expression" of Congress' intent, the SAA would prevail over other legislative documents that also might shed light on that intent.

6. **Q7(a):** With respect to the first question, Congress was confronted with a situation in which the DOC had countervailed a variety of government programs – including export restraints – that fell under the rubric of what were termed "indirect subsidies." The standard that the DOC had applied in these situations was different from the standard called for by the SCM Agreement. Congress chose to leave it to the DOC to decide, based on the facts of a case and the application of those facts to the new subsidy definition, whether a particular government program in a specific case constitutes an indirect subsidy. Insofar as export restraints are concerned, Congress refrained from pre-judging the matter one way or the other. The US is not in a position to speculate as to the precise circumstances under which the DOC might find that an export restraint does not meet the standards of section 771(5)(B)(iii). The DOC would apply the standards of that provision to the evidence before it.

7. **Q7(b):** The quoted language cannot be read in isolation from the proviso that immediately follows. When read together, the language constitutes a statement by Congress that congressional enactment of the URAA should not be construed as signifying that the types of government programs described in the SAA necessarily ceased to be countervailable. Instead, Congress refrained from pre-judging the issue. "Benefit" was not a new concept. With respect to "financial contribution," it is not an entirely new concept in the sense that the U.S. CVD law always has required some form of government action in order for a subsidy to be found to exist. With respect to the concept of "financial contribution" as articulated in subparagraph (iv) of Article 1.1(a)(1) of the SCM Agreement, the US is not in a position to elaborate on how this may have changed the DOC's approach to export restraints.

8. **Q8:** To the extent that the terms of a treaty are subject to interpretation, the SAA, as a general proposition, expresses the authoritative view of Congress and the Administration as to what those terms should mean for purposes of domestic law. With respect to the phrase "entrusts or directs", the SAA does not express a view on precisely what that phrase means, but instead merely expresses the general desire of Congress and the Administration that the phrase be interpreted as broadly as the statutory requirements permit.

Questions to the United States (Second Set)

9. **Q1:** The phrase "indirect subsidies" is merely a shorthand expression that the parties have used to describe the types of practices that potentially fall under subparagraph (iv). The important point is that subparagraph (iv) exists in order to prevent governments from avoiding subsidies disciplines by using private actors as the vehicle for transmitting a subsidy.

10. **Q2:** See paragraph 25 of the *U.S. First Submission*. An export restraint could constitute the government entrustment or direction of the provision of a good, a function which is expressly listed in subparagraph (iii).

11. **Q18:** The quoted phrase uses the term "subsidies" in the non-technical, commonly understood sense of the word. The US has not argued that the object and purpose of the SCM Agreement alone is controlling, nor has it argued that all government measures that distort trade are subsidies. What the US has argued is that the meaning of these provisions should not be improperly narrowed to exclude measures commonly understood to be subsidies that distort trade, where the text would not exclude them and where doing so would frustrate the object and purpose of the Agreement.

12. **Q19:** That is the primary objective of the SCM Agreement, as acknowledged by prior WTO panels. As the Appellate Body has noted, interpretations that make obligations under the SCM Agreement easy to circumvent are contrary to the object and purpose of that Agreement. Regulating countervailing measures is also a purpose of the SCM Agreement, but, as Canada has noted, should not be done in a manner which allows governments to engage in complex schemes that evade subsidy disciplines while artificially promoting domestic production.

13. **Q20(a):** The US agrees that it is clear that the government-directed provision of goods and services is a financial contribution and that it is not necessary to refer to item (d). However, item (d) provides useful contextual support for the conclusion drawn from the ordinary meaning of the text. Item (d) confirms that a financial contribution exists where private parties provide goods as the result of a "government-mandated scheme."

14. **Q20(b):** The US does not dispute the fact that the Appellate Body characterized the panel's findings as moot. However, the characterization of the panel's findings as moot does not necessarily mean that this Panel may not rely on those findings for useful guidance. The US does not disagree with the proposition that not all "government-mandated schemes" necessarily will violate item (d). However, there are two key points which distinguish the U.S. reading of *Canada - Dairy*. First, Article 1.1 and item (d) do not limit the concept of "subsidy" to instances where the government itself is providing a good. Second, the panel found that the goods were "provided", whether directly or indirectly, in a situation where prices were negotiated; *i.e.*, not pre-determined, as Canada and the EC argue is required.

15. **Q20(c):** Nothing in paragraph 93 of the Appellate Body report in the *FSC* case is inconsistent with the U.S. position. The Appellate Body simply rejected the U.S. argument that footnote 59 of the Illustrative List constituted an exception to the general definition of "subsidy" found in Article 1.

16. **Q21(a):** The US disagrees that an export restraint would open a range of possibilities to a producer of the restrained good. Instead, the US would characterize an export restraint as *limiting* the opportunities available to the producer of the restrained good. The US also disputes the EC's position

that the presence of options in response to an export restraint somehow would undermine the basis for ever finding that an export restraint constitutes "direction." To argue that an export restraint does not constitute direction because a producer of the restrained product is free to make choices it otherwise would not make absent the restraint does not answer the question of whether the export restraint constitutes a financial contribution in a situation where the producer chooses to provide the goods to the domestic industry as a result of the export restraint.

17. Assume that in a market free of a government-imposed export restraint, the producer of the input would choose to export the input to a different market for processing into a downstream product because it is more financially advantageous for it to do so. However, because of the export restraint, the producer of the input – which could not otherwise economically justify processing – begins to produce the downstream product, thereby artificially enhancing domestic production at the expense of foreign producers of the downstream product. None of this squares with Canada's statement that "[s]ubsidies . . . can deny countries the benefits they can otherwise expect to derive from comparative advantage and thereby inhibit efficient resource allocation."

18. **Q21(b):** The US agrees that there could be circumstances in which the continued sale of the restrained product would not constitute the government entrustment or direction of a good.

19. **Q21(c):** No, paragraph 81 does not make this implication. The causal relationship is something that must be examined on a case-by-case basis. Paragraph 81 (the fifth in a series of rebuttal arguments) simply stated that there may be situations in which Canada's and the EC's *theoretical* options are not available, in which case their arguments would be irrelevant.

20. **Q22:** The Panel's essential description of the U.S. position is correct. As used by the Panel, "targeting" is a very broad concept. However, the US believes that the EC used the term in a much narrower sense, suggesting a requirement that the intended beneficiaries of a subparagraph (iv) subsidy somehow be *de jure* specified in advance. There is no textual requirement in subparagraph (iv) of "targeting."

21. **Q23:** Yes.

22. **Q24:** No, the U.S. position is that inadequacy of remuneration or below-market price are not necessary conditions for a finding of a financial contribution in the form of the government-directed provision of a good within the meaning of subparagraph (iv). However, the evidence of a financial contribution and benefit could well overlap. In paragraph 36, the US merely was pointing out that the same desired price effect could be achieved by governments: (a) ordering producers to sell at fixed (lower) prices (which Canada appears to concede would be a subparagraph (iv) subsidy); or (b) taking actions that cause producers to sell domestically goods that they otherwise would have exported, thereby increasing supply and reducing price.

23. **Q25:** As noted above, evidence of benefit and financial contribution could well overlap, because subparagraph (iv) requires that there be a causal connection between the government action and the behaviour of the private actor(s) and that the activity undertaken by the private actor be one that governments normally engage in when providing a financial contribution. In stating that "normal" government functions refer to government action in the context of providing subsidies, the US was using the term "subsidies" in the non-technical, vernacular sense, similar to the manner in which it was used in the *Article XVI:5 Report*.

24. **26(a):** The US reiterates that it is not arguing anything about what the DOC would consider, because the DOC has yet to take a position on the issue. All the US is doing in this case is responding to Canada's claim that an export restraint can never, under any set of circumstances, constitute a subsidy. The US is not arguing that the text of subparagraph (iv) requires that a government previously has been

in the business of providing the good or service in question. Instead, an appropriate line of inquiry would be whether the private party action is of the type that a government typically would take, or could take, in an effort to allocate resources through taxation or subsidization.

25. **26(b):** No, this is not what the US is arguing. The US is simply arguing that when the extent and effectiveness of government involvement is such as to cause private actors to provide goods to domestic purchasers when they otherwise would have sold the same goods for export, the behaviour of the private actors in no real sense differs from the behaviour of a government if it had provided the goods directly.

26. **26(c):** The use of the word "could" was not intended to have any special meaning. As a general proposition, the US agrees with the Panel that if the degree of government activity is insufficient to satisfy the standard of subparagraph (iv), a subsidy would not exist.

27. **26(d):** While separate requirements, the concepts of financial contribution and benefit are not totally unrelated.

28. **26(e):** In the view of the US, the phrases "normally vested" and "in no real sense differs" refer to the government functions of taxation and subsidization. *See U.S. First Submission*, paras. 51-54. The only prior negotiating history – the *Article XVI:5 Report* – supports this interpretation.

29. **Q27:** With respect to the SAA, it is not "tentative", but it expresses no position on indirect subsidies other than that they may be treated as subsidies if they satisfy the standard of section 771(5)(B)(iii). There simply is no post-WTO practice to speak of.

30. **Q28:** As a general proposition, in terms of legislative history the SAA ranks supreme.

31. **Q29:** The DOC determinations in these cases were based on multiple volumes of factual analysis, including lengthy memoranda that detailed how the requirements for countervailability had been met. Nothing in the passage suggests a belief on the part of the DOC that it is free to ignore the new standard contained in section 771(5)(B)(iii) or subparagraph (iv).

32. **Q30:** The US is not in a position to answer this question, because it would be inappropriate, impractical, and possibly unlawful for the US to do so. In addition, a statement by the DOC as to what it might do – as opposed to what it is required under U.S. law to do – is irrelevant to the issues in this case.

33. **Q31:** This is not a correct reading. The quoted paragraph does not even address export restraints; it merely describes certain aspects of the new subsidy definition and GATT Article VI. The third paragraph makes clear that an indirect subsidy may be countervailed only if the DOC is satisfied that all of the requirements of section 771(5)(B)(iii) are satisfied.

34. **Q32:** The standard which the EC claims the SAA incorporated in the new statute is discussed in the second of the three SAA paragraphs at issue in this case, which merely describes, as a factual matter, what the DOC did under pre-WTO law. The third paragraph makes clear that programs found to be subsidies by the DOC under its pre-WTO standard would remain countervailable only if the DOC determined, on a case-by-case basis, that the new WTO-consistent standard is satisfied.

35. **Q33:** The SAA does not authorize or direct the DOC to construe section 771(5)(B)(iii) in the manner described. It would be inaccurate to say that the SAA "authorizes" any action by the DOC. It has no legal effect independent of the statute (and, thus, is not a measure), but rather provides an authoritative expression regarding the proper interpretation of the statute. With regard to the interpretation of section 771(5)(B)(iii), the SAA expressed the view that the DOC countervail only government practices that satisfy all of the elements of the statute.

36. **Q34:** For purposes of a final DOC determination, the domestic legal standard is found in section 516A(b)(1)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516A(b)(1)(B)(i), which sets forth the standard of review applicable to DOC determinations. Because the DOC has not yet had to apply the "entrusts or directs" standard to an export restraint, it has not developed any criteria for making such a determination.

37. **Q35:** In *Live Cattle* (CDA-22), the DOC's main discussion of the Canadian Wheat Board ("CWB") runs from pages 57,047 to 57,052. In this discussion, the DOC simply found that there was no "benefit" (*see, e.g.*, page 57,048 (left column, second full paragraph) and page 57,052 (middle column, second full paragraph). The DOC never determined, because it did not have to, that the actions of the CWB constituted a "financial contribution."

38. **Q36(a):** The ordinary meaning of "direct" requires a causal connection between the government measure and the behaviour of private actors in order for a financial contribution to exist. Thus, the legal basis is found in subparagraph (iv) itself. It would be short-sighted to focus solely on the financial contribution element of an actionable subsidy in analysing the "slippery slope" argument. One must take into account the fact that the application of the concepts of "benefit" and "specificity" will weed out government measures that might arguably satisfy the definition of "financial contribution." Finally, the theoretical possibility that some Member might apply subparagraph (iv) in an overly broad manner does not justify imposing in the abstract Canada's narrow interpretation, which would render subparagraph (iv) a nullity and leave a gaping loophole subject to abuse.

39. **Q36(b):** The requirements of "benefit" and "specificity" are relevant because Canada and the EC are attempting to induce the Panel to adopt an unwarrantedly narrow interpretation of subparagraph (iv). The "benefit" and "specificity" elements will operate so as to render many alleged indirect subsidies non-actionable and, thus, non-countervailable.

40. **Q37:** This dispute involves a measure (the statute) that does not expressly preclude treating export restraints as financial contributions. The measure cannot be found as such to be inconsistent with U.S. WTO obligations because of the mandatory/discretionary doctrine. None of the other "measures" at issue "authorize" action by the US government. The doctrine has been applied even where (unlike here) there has been explicit authorization to undertake a WTO-inconsistent act. The obligations of Article 32.5 and Article XVI:4 are to ensure that laws, regulations and administrative procedures are such so as to permit domestic authorities to act in a WTO-consistent manner. As the Appellate Body has observed, ensuring conformity cannot mean a strict guarantee or absolute assurance as to the *future* application of a measure, because such a standard would "be very difficult, if not impossible, to satisfy since no one can predict how unknown administrators would apply, in the unknowable future, even the most conscientiously crafted compliance measure."

41. **Q38:** Yes, that is the U.S. position, and neither Canada nor the EC disputes this position. One of the WTO panel reports in which the mandatory/discretionary doctrine has been applied is *Canada - Aircraft*. It would be a peculiar result if, under the same agreement, a measure that merely authorized the provision of prohibited subsidies was deemed WTO-consistent, while a measure that merely did not expressly preclude the treatment of export restraints as subsidies was deemed WTO-*in*consistent.

42. **Q39:** In the scenario hypothesized by the question, there would be no principled rationale for deciding to address an issue the resolution of which is unnecessary for purposes of resolving the dispute. The Appellate Body already has stated that it is not the proper role of panels under the DSU to pursue dispute prevention by making abstract rulings. Canada cites to no authority for the proposition that a moot question of WTO-consistency must be addressed in a situation where the case must be dismissed for other reasons. In addition, in the cases Canada does cite, the nature of the GATT or WTO obligations in question appear to have been more complicated than the obligations at issue in this case. In those

cases, the panels may have found it necessary to define the obligation precisely before turning to the question of whether the responding party's measure mandated a violation of that obligation. Canada appears to suggest that because the US does not agree with Canada's interpretation of the SCM Agreement, the fact of this disagreement justifies having the Panel decide the substantive issue. However, the drafters of the DSU could not possibly have intended that the existence of an abstract disagreement was something that called for a resolution by a WTO dispute settlement panel in the form of an advisory opinion. If this Panel were to issue the type of advisory opinion sought by Canada, there would be no limits on the dispute settlement case load involving requests from complainants for similar advisory opinions. The possibilities for abuse are endless, and are much more real than Canada's "slippery slope" scenarios. Articles 24.3 and 24.4 of the SCM Agreement establish a mechanism for delivering advisory opinions. This suggests that the drafters were aware of the concept of an advisory opinion and knew how to establish a mechanism for generating such opinions. Second, the existence of the PGE advisory opinion mechanism means that Canada has other options available to it if it needs assistance in making its choices. In addition to relying on the expert advice of its private counsel, Canada can ask the PGE – or it can ask the Committee to ask the PGE – for an advisory opinion. There is no need to waste the time and resources of the WTO dispute settlement system.

43. **Q40:** The EC mischaracterizes the Appellate Body's rulings. The EC's arguments do not establish that the SAA and the Preamble are measures. The Appellate Body did not decide what constitutes a "measure" for purposes of WTO dispute settlement. Instead, the Appellate Body merely found that a "measure" and a "claim" are two different things. In footnote 47 of the report (which is clearly dicta) the Appellate Body did not say that "all" acts "are" measures. The brief reference to *Japan - Semiconductors* fails to disclose the particular circumstances of that case. When the relevant portions of that report are considered, it becomes apparent that the ruling of the panel in that case was far less sweeping than the EC makes it out to be. Furthermore, with respect to the other cases cited in footnote 47 of the *Guatemala - Cement* report, those cases involved situations where the relevant WTO agreement established an affirmative obligation to act, which is not the case here. Even the EC concedes that the Preamble could constitute a measure under Article 6.2 of the DSU only "as long as this act [the Preamble] contained authoritative guidance for the competent administration." The EC does not explain what "authoritative guidance" means, but simply relies on Canada's erroneous characterization of the status of regulatory preambles. However, the Preamble is not binding on the DOC and does not mandate or require the DOC to do anything. Moreover, in terms of its content, the Preamble does not express the view that the statute requires the DOC to treat export restraints as subsidies, but instead expresses the tentative opinion that the statute "would permit" the DOC to treat export restraints as subsidies.

Questions to Canada (First Set)

44. **Q3:** This is precisely what Canada is asking the Panel to decide.

45. **Q4:** It is dangerous for the Panel to seek to analyze an ill-defined "measure" identified as a "package". The proper analysis of such a claim cannot be undertaken based upon abstract notions of whether documents cited by a complaining party "must be analyzed together," but on the status of the cited documents under the responding Member's domestic law. Neither the SAA nor the Preamble mandates that the DOC treat export restraints as subsidies. Moreover, there is no "practice" of doing so, and even if there were, that practice could not mandate the treatment of an export restraint as a subsidy under basic (and uncontested) principles of U.S. administrative law. Given the absence of a DOC regulation on this issue, the sole binding authority for addressing the status of export restraints is the statute, which incorporates the standards of the SCM Agreement.

Questions to Canada (Second Set)

46. **Q5:** Obviously, each situation would have to be assessed on its own facts, and a causal relationship or nexus would have to exist between the government action and the direct transfer of funds in order to find government entrustment or direction. Presumably, Canada (and the EC) would argue that a financial contribution would not exist because the bank "need not" lend the funds. However, to say this is to engage in a semantic game.

47. **Q6:** If Canada is making the assertion described by the Panel's question, Canada has not provided any evidence to support this assertion. Moreover, "choice" must be understood to mean a real, commercial choice.

48. **Q8:** The US does not disagree with the EC's assertion that an export restraint could form part of a package of measures that could amount to a subsidy under subparagraph (iv). However, the US does not rule out the possibility that an export restraint could constitute a subsidy standing alone, depending upon the facts. The EC's point demonstrates why the Panel should refrain from making findings in the abstract. What precisely would the "package of measures" have to consist of in order for government entrustment or direction to exist? Even the EC offers no facts.

49. **Q9:** There is no substantive basis for making such a distinction. In the hypothetical posed, ordering producers not to export is substantively no different from ordering them to sell only to domestic purchasers. An export restraint *is* a direction to provide goods to domestic purchasers if it can be shown, as a factual matter, that there is a proximate causal relationship between the export restraint and the behaviour of the producers of the restrained product. Of course, whether such a causal relationship exists is something that can only be assessed on a case-by-case basis. Canada has failed to demonstrate that there is not, and can never be, an export restraint that has the type of posited effect. Furthermore, if the restraint results in the producer having no practical or commercial choice but to sell in the domestic market, the restraint is the same as a direction to sell in the domestic market. Canada's efforts to avoid discussing the object and purpose of the SCM Agreement, which it very nicely summarized in CDA-106, is telling.

50. **Q10:** See *U.S. First Submission*, paras. 40-44. Even the EC does not agree with Canada's interpretation of the phrase.

51. **Q11:** The interpretations referred to are interpretations offered for purposes of this dispute in order to rebut Canada's claim that an export restraint can never, under any set of circumstances, constitute a subsidy. The DOC has yet to apply the standard set forth in section 771(5)(B)(iii) and subparagraph (iv) in an actual CVD proceeding to anything other than government-directed provisions of credit. However, based only on the text of subparagraph (iv), the US seriously doubts that all regulatory measures, as claimed by Canada, would satisfy the standard for a subsidy under subparagraph (iv). Among other things, there would need to be a demonstrated causal relationship that results in a private body taking an action of the type listed in subparagraphs (i) through (iii).

52. **Q11(a):** Absent other facts that might call for a different conclusion, the US fails to see how this could not constitute the government-directed provision of a good based on the ordinary meaning of "direct." There is no textual support for the proposition that price or quantity (or any other terms) need be specified. As to how narrowly should this provision be construed, "entrusts or directs" language combined with the requirements of "benefit" and "specificity", are sufficient to address Canada's "slippery slope" argument.

53. **Q11(b):** Based on the ordinary meaning of the text, such an "explicit requirement" need not be present. Moreover, such an interpretation would elevate form over substance.

54. **Q11(c):** To the extent the Panel chooses to consider the status of export restraints in the abstract, this is the crucial question. The US agrees with the underlying premise of the question that, based on the

ordinary meaning of the term "direct", there would have to be a demonstrated causal relationship between an export restraint and a private body's action (*e.g.*, the provision of a good) in order for the standard in subparagraph (iv) to be satisfied. Because the DOC has not had to address this question under post-WTO law, the US is not in a position to opine further on how strong this causal relationship must be. Under pre-WTO law, the DOC applied a "direct and discernible effect" standard to assess the causal relationship between an export restraint and the domestic prices of the restrained product. The US is not suggesting that this would be the standard applied by the DOC under post-WTO law in the context of an actual CVD case. Nevertheless, the DOC found that sometimes an export restraint had an appreciable effect on prices, and that other times it did not. The DOC did not simply assume that a causal link existed.

55. **Q12(a):** Canada's interpretation is too restrictive and would render subparagraph (iv) a nullity. The only negotiating history on subparagraph (iv) makes it clear that the government functions referred to in subparagraph (iv) relate to government actions in the context of providing a subsidy. This is another effective limitation on Canada's "slippery slope" argument. The induced private action must entail a reallocation of resources by way of taxation or subsidization or it would not be the type of government action that normally falls under subparagraphs (i)-(iii).

56. **Q12(b):** There is a difference between benefit and financial contribution for purposes of subparagraph (iv). Financial contribution would appear to be a matter of: (1) a proximate causal relationship between the government action and the private action; and (2) the private action being a form of taxation or subsidization (*i.e.*, the type of action that a government "normally" would do). While the evidence for this second aspect and "benefit" may overlap, they are not the same thing. Insofar as Canada's "slippery slope" argument is concerned, it is not particularly important whether innocuous government regulations are excluded from the scope of an actionable subsidy because they are not financial contributions, do not confer a benefit, or are not specific.

57. **Q12(d):** The provision of a good by a private body at the direction of a government could satisfy the criteria of "normally vested in the government" and "in no real sense differs from practices normally followed by governments" where a subsidy results.

58. **Q13:** There is no requirement in any of the subparagraphs of Article 1.1(a)(1) that there be "certain pre-determined conditions". While the EC erroneously accuses the US of focusing solely on the object and purpose of the SCM Agreement (which object and purpose certainly support the U.S. position), the *EC Submission* contains no analysis of the ordinary meaning of the words used in subparagraph (iv). If the Panel examines the *EC Submission* carefully, it will see that there is *not a single* reference to a definition of any of the terms at issue.

59. **Q14:** At this point, the US merely would recall the principle set forth in paragraph 7.19 of the *U.S. 301* panel report. Under this principle, which is referred to in paragraph 71 of the *U.S. Request*, while the Panel is not bound to accept the interpretation presented by the US, the US can reasonably expect that the Panel will give considerable deference to the US' views on the meaning of its own law. Contrary to the picture Canada attempts to paint in paragraph 16 of *Canada's Response to U.S. Request for Preliminary Rulings* ("*Canada's Response*"), this principle is not of the US' creation, but rather was articulated by the panel in the *U.S. 301* case.

60. **Q15:** The interpretation of the SAA proposed by Canada and the EC would read the proviso out of the SAA. A U.S. court or agency would not render the proviso ineffective by ignoring it.

61. **Q16(a):** The very question demonstrates the absurdity of Canada's claims. If the type of "administrative commitment" alleged by Canada in this case is considered to be a "measure", the consequences for the WTO dispute settlement system would be much more dire and real than the imagined "slippery slope" arguments Canada has advanced.

62. **Q16(b):** Because the SAA does not require the DOC to treat export restraints as subsidies and because the Preamble is at most a non-binding, tentative opinion by the DOC to the effect that an export restraint might constitute a subsidy under the new definition of that term, Canada needs something called "practice" to make its claims succeed. However, there simply is no practice for Canada to challenge in the sense of actual, post-WTO determinations by the DOC that an export restraint constitutes a subsidy (or even a financial contribution).

63. **Q16(c):** This question demonstrates the validity of the U.S. position that Canada's claims regarding "US practice" are not properly before the Panel. Even after one full round of briefing and a meeting of the parties with the Panel, it is difficult to discern exactly what Canada means by "practice." If this does not constitute prejudice to the US (assuming *arguendo* that a showing of prejudice is required), then the pleading requirements of the DSU are meaningless.

64. **Q16(d):** Canada has not disputed the principle that the DOC is not bound by its prior determinations. Although the phrase "administrative commitment or policy" appears to be of Canadian derivation, it stands to reason that if the DOC is not bound by its determinations in actual cases, it is not bound by an "administrative commitment or policy" articulated in the abstract and outside the context of actual cases. Canada has not disputed the continuing validity of the mandatory/discretionary doctrine. Therefore, Canada's alleged "administrative commitment or policy" cannot be found as such to be inconsistent with U.S. WTO obligations. If the DOC should ever find a Canadian export restraint to be a subsidy in an actual case, or if the DOC should ever promulgate a binding regulation that mandated WTO-inconsistent action, Canada would be entitled to bring a dispute to the WTO. Until that time, however, Canada's rights under the WTO agreements have not been affected.

65. **Q17:** The US confirms the referenced statement at the first meeting of the Panel. Although the US disputes that the SAA and the Preamble are measures, assuming for purposes of argument that they are, the arguments set forth in paragraphs 43-55 of the *U.S. Oral Statement* apply equally to them.

Questions to the European Communities

66. **Q2(c):** This would appear to be the upshot of the EC's argument. At this point, the US simply would note that Article 1.1(a)(1) of the SCM Agreement refers to a financial contribution "by a government *or any public body*". (Emphasis added). The parties to this case appear to agree that a corporation would constitute a "body". Therefore, it is difficult to see how a "government-owned company" could be incapable of providing a financial contribution in the form of a provision of goods.